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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term 1930
Number 1

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, PLAINTIFF IN ERROR,

VS.

AUGUST E. HOLMBERG, DEFENDANT IN ERROR

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR

C. A. SORENSEN, Attorney General of Nebraska,
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C. A. SORENSEN, Attorney General of Nebraska,
HUGH LAMASTER, Assistant Attorney General,
Attorneys for Defendant in Error.

I.

Plaintiff in error, having pleaded and relied upon the Nebraska statute relating to railroad crossings (chap. 167, Laws of Nebraska, 1923, p. 397) in its answer

to the complaint of defendant in error, Holmberg, before the Nebraska State Railway Commission, may not now assert unconstitutionality of such statute.

In its answer plaintiff in error alleged, among other things, the following:

> "Further answering, defendant alleges that the cost of installing an underground crossing as alleged in plaintiff's complaint would range from twelve hundred and forty-one dollars ($1,241.00) to two thousand one hundred and twenty-six dollars ($2,126.00) depending upon the size of the crossing to be built and defendant alleges that under the statutes of this state plaintiff would be bound to bear the expense of such crossing or some part thereof and defendant alleges that plaintiff has not tendered nor offered to tender to the defendant any part of such expense and that such tender and security and deposit for such expense is a condition precedent to the plaintiff's right to have any order in his favor as prayed in his complaint." (R. 4.)

There is no statute in Nebraska on the subject of railroad crossings over private lands, except that cited above (copied at page 10 of brief of defendant in error).

A party who pleads a statute and invokes its protection may not, at a later stage of the proceeding, assert unconstitutionality of such statute.

Wall v. *Parrot Silver & Copper Company*, 244 U. S. 407.

Hurley v. *Commission of Fisheries of Virginia*, 257 U. S. 223.

II.

The farm of defendant in error is amply valuable to justify the ordering of a crossing.

While there is no direct evidence in the record as to the market value of the farm, there is ample evidence showing that it is of large value. The farm consists of one hundred and forty-eight acres, being a quarter section less what the railroad takes out (R. 14), (147.78 acres, R. 70), improved with the following: two-story dwelling house, barn, double corn-crib, granary, machine shed, hog house, cattle shed or barn, chicken house, etc., well, windmill and supply tank (R. 15). The southwest half of the farm is fenced hog-tight (R. 17) and the northeast half is fenced with barbed wire (R. 18). There also appear to be yards and a small pasture in the southwest half of the farm. There is also other fencing (Exhibit opposite R, p. 46, marked "74"). Mr. Holmberg apparently has the necessary farm implements, as he has a machine shed (R. 15), including a tractor for plowing (R. 75).

The numbers of live-stock, kept on the farm, vary. At the time of the hearing before the State Railway Commission there were four horses, eight milch cows and ninety hogs (R. 16). Formerly Mr. Holmberg milked fifteen cows. He usually raises about 140 hogs per year (R. 16). These facts establish ample value to show, in connection with the uses of the farm, the absolute necessity of a crossing for livestock if the farm is to be operated efficiently and profitably. Mr. Holmberg is willing to pay the four hundred and fifty-three dollars, his share of the cost of the crossing (R. 59), or more if the crossing should cost more than the estimate (R. 60).

That the value of the farm is sufficient to justify the ordering of a crossing is not questioned in the pleadings, or in the evidence, or in the briefs. It is not mentioned in the assignments of error.

Respectfully submitted,

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HUGH LAMASTER,
Assistant Attorney General,
Attorneys for Defendant in Error.